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# IN THE SUPREME COURT OF THE UNITED STATES

**October Term — 1957**

**No. _____**

FIRST METHODIST CHURCH OF SAN LEANDRO, a California Corporation,

*Appellant,*

vs.

RUSSELL C. HORSTMANN, as Assessor of the County of Alameda, State of California; COUNTY OF ALAMEDA, CALIFORNIA; CITY OF SAN LEANDRO, CALIFORNIA; and EDWIN MEESE, JR., as Tax Collector of the County of Alameda,

*Appellees.*

---

FIRST UNITARIAN CHURCH OF BERKELEY, a California Corporation,

*Appellant,*

vs.

RUSSELL C. HORSTMANN, as Assessor of the County of Alameda, State of California; EDWIN MEESE, JR., as Tax Collector of the County of Alameda; COUNTY OF ALAMEDA; JAMES H. BRIGGS, as Assessor of the City of Berkeley, State of California; FRED A. BIRD, as Tax Collector of the City of Berkeley; and CITY OF BERKELEY,

*Appellees.*

**On Appeal from the Supreme Court of the State of California.**

# MOTION TO DISMISS

Appellees move, pursuant to Rule 16(1) Revised Rules of the Supreme Court of the United States, that

the appeal from the final judgment of the Supreme Court of the State of California be dismissed for want of jurisdiction on the ground that the appeal does not present a substantial Federal question.

## OPINIONS BELOW

The Opinion of the Supreme Court of California (Jur. St., App. A) is reported at 48 A.C. 470, 311 P. (2d) 542.

## JURISDICTION

The judgment of the Supreme Court of California was entered April 24, 1957. Notice of Appeal was filed on May 27, 1957, and an enlargement of time until September 24, 1957, was granted by the Chief Justice of this court and filed therewith July 10, 1957. The jurisdiction of this court is sought to be invoked under U.S.C. Title 28, Section 1257(2).

Jurisdiction is challenged by this motion.

## QUESTIONS PRESENTED

1. Whether the State of California may affix as a condition of the enjoyment of a tax exemption privilege the requirement that the applicant subscribe to a loyalty declaration, without violating the First and Fourteenth Amendments of the Federal Constitution and Article I, Section 9, Clause 3 of the Federal Constitution?

2. Whether such requirement constitutes an incursion by the state into a field preempted by the Fed-

eral government thus rendering said requirement unconstitutional?

## STATEMENT

The manner in which these consolidated cases arose in the courts below is set forth in the majority Opinion of the Supreme Court of the State of California found in Appendix A in the Jurisdictional Statement of the Appellant. This statement of facts is adopted by the Appellees herein as correct and are by reference made a part of this Motion to Dismiss.

## ARGUMENT

### INTRODUCTION

Appellants list some seven questions as the basis for reversal of the decision of the California Supreme Court. (Jur. St., pp. 4-6.) In an attempt to demonstrate that, as presented here, none of the problems raised by appellants presents a substantial Federal question, respondents will undertake a seriatim treatment.

### I. NEITHER ARTICLE XX, SECTION 19 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, NOR SECTION 32 OF THE REVENUE AND TAXATION CODE OF THAT STATE REPRESENT AN UNCONSTITUTIONAL INFRINGEMENT ON THE FIRST AMENDMENT RIGHTS MADE APPLICABLE TO THE STATE BY THE FOURTEENTH AMENDMENT.

It is elementary that neither freedom of speech nor freedom of religion are absolutes. No matter how much we revere these ideals and no matter how clearly we recognize the indispensable role they have played

in making our nation great, we must further recognize that they are subject to limitation. *Dennis* v. *U. S.*, 341 U.S. 494, 503; *American Communications Association* v. *Douds*, 339 U.S. 382, 394: *Breard* v. *Alexandria*, 341 U.S. 622, 642; *Reynolds* v. *U. S.*, 98 U.S. 145; *Cleveland* v. *U. S.*, 329 U.S. 14; *Prince* v. *Mass.*, 321 U.S. 158. The present case is a clear example of the type, where the effect on speech and religion, if any at all, is so slight, so indirect, so insubstantial, that it is far outweighed by the right of the State of California to attach as a condition for receipt of a property tax exemption the Loyalty declaration set forth in Section 32 of the Revenue and Taxation Code.

It should perhaps be emphasized that tax exemptions are offered to organizations such as appellants herein because such institutions are regarded as establishments to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. *County of Santa Clara* v. *Southern Pacific*, 18 Fed. 385, 400. Neither of the attacked sections asks appellants nor commands appellants to say, think or believe anything that they do not wish for whatever reason, or more particularly, for reasons of conscience. They do, however, ask for that minimum proof of loyalty, upon which the tax exemption is justified, before the state is free to extend its bounty. This is not a free speech, religion or assembly question. It deals merely with the right of the state to assure itself that a tax exemption applicant meets the qualifications set forth by the people of the state, and such a question is a matter of state concern. *Chanler* v. *Kelsey*, 205 U.S. 466; *Orr* v. *Gilman*, 183 U.S. 278.

In addition, this court has, in previous decisions in related fields put to rest the question of whether a state may impose conditions upon the enjoyment of certain privileges without running afoul of the First and Fourteenth Amendments. *Garner* v. *Public Works of Los Angeles*, 341 U.S. 716; *Adler* v. *Board of Education*, 342 U.S. 485; *Gerende* v. *Baltimore, et cetera Board of Elections*, 341 U.S. 56; *U. S.* v. *Schwimmer*, 279 U.S. 644; *In re Summers*, 325 U.S. 561.

Further, this court has also laid to rest appellants' argument that they may, by the mere assertion of conscience, conviction or belief, render the state powerless to regulate conduct in violation of social duty or subversive of good order. (Jur. St., pp. 9-11.) *Reynolds* v. *U. S.*, 98 U.S. 145; *Stansbury* v. *Marks*, 2 Dall. 213; *Prince* v. *Mass.*, 321 U.S. 158; *Cleveland* v. *U. S.*, 329 U.S. 14.

Appellants also argue that the questioned sections must fall since the language used is vague and uncertain. (Jur. St., p. 5.) It should be emphasized at the outset that imagination can no doubt conjure up hypothetical cases in which the meaning of the terms used will be in question. However, as this court has stated, "(T)he applicable standard . . . is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important." *American Communications Association* v. *Douds*, 339 U.S. 382, 412; *Dennis* v. *U. S.*, 341 U.S. 494, 515-516.

Language similar to that used in the questioned enactments has been approved. *Whitney* v. *California*, 274 U.S. 357, 368; *Lockhart* v. *U. S.*, 264 Fed. 14, Cert. den. 254 U.S. 645; *Wimmer* v. *U. S.*, 264 Fed. 14, Cert. den. 253 U.S. 494; *Samuels* v. *United Seamen's Service, Inc.*, 165 Fed. (2d) 409, 411-412. Such language does not require that appellants have "prophetic" understanding of its meaning. The oath is narrowly drawn, the language used in the context of its use is clear and precise; the standard easily ascertainable. It is only when one adopts the scholastical approach of indulging in excessive subtlety and petty pedantism that the clarity of Article XX, Section 19 and Sections 32 is questioned.

One other comment should be made. At page 17 of appellants' Jurisdictional Statement the statement is made that the questioned enactments are "void for vagueness in being insufficiently precise and clear in stating what a person is forbidden to say." It should be pointed out that no one, least of all appellants, are forbidden from saying, thinking or doing anything by Article XX, Section 19 or Section 32. What the sections do require, however, is that an applicant for a tax exemption, clearly a matter within the plenary power of the state, establish his or its eligibility.

## II. THE ATTACKED ENACTMENTS MERELY CONDITION THE ENJOYMENT OF A PRIVILEGE ON PROPER QUALIFICATION BY THE APPLICANT; THEY ARE IN NO SENSE BILLS OF ATTAINDER.

In question 2 (Jur. St., p. 5) appellants raise a great many questions which seem particularly mis-

directed in view of the nature of the enactments here involved. The church tax exemption provided by the State of California is irrefutably a privilege and the applicant is required to come forward and affirmatively show his qualification to receive the exemption. Indeed, the burden is on the taxpayer to demonstrate his qualification for exemption. *Pacific Home* v. *County of Los Angeles*, 41 Cal. (2d) 844, 849; *Cedars of Lebanon Hospital* v. *County of Los Angeles*, 35 Cal. (2d) 729, 734. The requirement of Section 32 does no more than add an additional requisite basic to qualification. Quite obviously any person or organization which subscribes to the oath will be presumed to have done so honestly. The burden of proving perjury for false swearing remains, as it always has, on the People of the State of California. All the rights of which appellants speak will be available to them at that time. Until such time as the question of false swearing arises, there is no criminal proceeding, there is simply and solely the question of qualification to receive a tax exemption.

Appellants' Bill of Attainder argument is equally specious, since the facts of the instant case fall squarely within this court's reasoning in *American Communications Association* v. *Douds*, 339 U.S. 382, where the court said at page 413:

> "Those cases, and this also, according to the arguments involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: In the previous decisions the individu-

> als involved were in fact being punished for past acts; whereas in this case they are subject to possible loss of position only because there is substantial grounds for the congressional judgment that their belief and loyalty would be transformed into future conduct . . .
>
> "This distinction is emphasized by the fact that members of those groups identified in Section 9h are free to serve as Union officers if at any time they renounce the allegiance which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in Section 9h, is not a bar to resumption of the position. In the cases relied upon by the unions, on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See *U. S.* v. *Lovett* (supra) at page 314; *Cummings* v. *Missouri* (supra) at page 327 . . . We cannot conclude that this section is a bill of attainder."

The oath required by Section 32 does not inflict punishment without judicial trial for a past act. The requirement of Section 32 is that there be present loyalty—a condition of past disloyalty does not represent a bar to the exemption.

In addition, before there can be a Bill of Attainder there must be punishment "for the past act." Historically, of course, the punishment imposed by the most

dreaded Bill of Attainder was death. Less severe punishments were imposed by so-called Bills of Pains and Penalties. As stated in *Garner* v. *Los Angeles Board, et al.*, 341 U.S. 716 at page 722:

> "Bills of attainder are 'legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . .' (Citations omitted.) Punishment is prerequisite . . ."

Involved in the *Garner* case was legislative action curtailing a privilege previously enjoyed. This Court did not consider this punishment. Clearly, punishment presupposes an offense. Here we have no offense of which the appellants are deemed guilty. All that has happened is that a privilege previously enjoyed is withheld because of failure to subscribe to the oath.

## III. APPELLANTS' UNCONSTITUTIONAL CONDITION ARGUMENT IS FALLACIOUS IN ABSENCE OF A SHOWING THAT THE PROSCRIPTIONS OF THE ATTACKED SECTIONS RENDER THEM INVALID.

The contention that Article XX, Section 19 and Section 32 impose an unconstitutional condition upon the enjoyment of the privilege of tax exemption is fallacious inasmuch as it presupposes the existence of a constitutional right to overthrow the government by force or violence. (Jur. St., p. 5.)

In the past the doctrine of unconstitutional conditions has had its principal application in inter-state

commerce. *Terral* v. *Burke Construction Co.*, 257 U.S. 259; *Western Union Telegraph Company* v. *Kansas*, 216 U.S. 1; *Frost Trucking Company* v. *Railroad Commission*, 271 U.S. 583. In these situations it was clear that the privilege extended was conditioned on the giving up of an unquestioned constitutional right.

However, the doctrine of unconstitutional conditions is inapplicable in the instant case. Appellants' theory appears to be that their right of free speech and political activity is unconstitutionally interfered with as a condition of receiving the tax exemption. However, this argument assumes as a fact that there is a constitutional right to advocate the overthrow of the government by force or violence. That there is no such right has been demonstrated by this court in other contexts (*Dennis* v. *U. S.*, 341 U.S. 494; *Whitney* v. *California*, 274 U.S. 357); and in the instant context depends on the answer to appellants' question I. (Jur. St., p. 4.) As we noted, there is no question of any infringement on First Amendment rights by the attacked enactments. This being so there can be no question of an unconstitutional condition.

## IV. THERE IS NO VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY THE QUESTIONED SECTIONS.

The fourth point raised by appellants (Jur. St., p. 5) is especially esoteric, and thus a difficult one of which to dispose. Perhaps the best answer is to repeat the obvious fact that while California's tax exemptions are offered on a class basis, that is, churches, veterans,

etc., they are offered to all within a particular class on the identical terms and conditions.

On the other hand, this might be a mere reiteration of the argument in the court below to the effect that the classification into declarants and non-declarants, that is, those who will subscribe to the oath and those who will not, is discriminatory as to appellants because they fall into the latter category. This type of sophistry hardly deserves a reply, but perhaps it would not be amiss to point out that classification of an obviously less desirable nature was sustained in *Terrace* v. *Thompson*, 263 U.S. 197, where this court upheld State legislation which denied the right to own property to aliens who would not declare their intention to become citizens, even though some of the latter group because of ancestry were ineligible for citizenship.

## V. THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT RAISES NO QUESTION IN CONNECTION WITH THIS LITIGATION.

The fifth point raised by appellants (Jur. St., p. 5) contains little, if any, discussion, and again, for that reason, is difficult to deal with. However, it is well recognized that the privileges and immunities provision of the Fourteenth Amendment protects "all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship." *Hague* v. *C.I.O.*, 307 U.S. 496; *In re Slaughter House* cases, 83 U.S. 36, 16 Wall. 36. The privilege of tax exemption is one which the state within constitutional limits is free to

extend or deny on such conditions as it sees fit. *Madden v. Kentucky*, 309 U.S. 83. There are no cases which as yet would include within the compass of the privileges or immunities clause this plenary right of the state over taxation.

## VI. THE APPLICATION OF SECTION 32 OF THE REVENUE AND TAXATION CODE TO ONLY THOSE WHO SEEK PROPERTY TAX EXEMPTIONS DOES NOT RENDER IT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

As stated by the California Supreme Court (Jur. St., App. A, pp. 10-11), Article XX, Section 19, contains no exceptions, and it is the duty of the local assessors, regardless of statutory implementation such as Section 32, to extend exemptions only to those taxpayers who meet *all* the qualifications of the particular exemption sought.

With the above in mind, the attack by appellants on Section 32 is placed in proper perspective. Section 32 clearly applies to all exemption claimants to which it relates and in this connection supplies appropriate means for carrying out the purposes of Section 19 of Article XX. The equal protection clause "means that the rights of all persons must rest upon the same rule under similar circumstances . . . and that it applies to the exercise of all powers of the state which can affect the individual or his property, including the power of taxation . . . it does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification must

be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced, shall be treated alike. . . . That is to say, mere difference is not enough: the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." *Louisville Gas Company* v. *Coleman*, 277 U.S. 32, 37; accord *Walters* v. *St. Louis*, 347 U.S. 231, 237.

The legislature has not attempted, by Section 32, to limit the application of the constitutional mandate of Article XX, Section 19. The legislature could not, by the enactment of Section 32, limit the requirement, that in order to receive any tax exemption, the applicant must not advocate the overthrow of the government by force or violence. In following the mandate of Article XX, Section 19, that it pass all laws necessary to carry out the provisions of the article, the legislature was merely following a classification procedure that it had previously established. In order to obtain certain exemptions, Revenue and Taxation Code Sections 251-261 require that an affidavit or claim be filed. Such affidavits are required to claim the veterans, church, orphanage, college and welfare exemptions. No procedure is specified and no affidavit is required to obtain the exemptions for public libraries and museums, growing crops, public schools, state, county or city property, U. S. exempt property, cemeteries, bonds,

vessels, householders and trees and vines. These exemptions which do not have to be claimed by affidavit are self executing.

If, as appellants argue, Section 32 is unconstitutional in requiring an oath to obtain certain property tax exemptions and not others, then by the same reasoning, Revenue and Taxation Code Sections 251-261 would be invalid in setting up a procedure, including the requirement of affidavits to claim certain exemptions where the same procedure is not required to claim other exemptions. But that such result does not obtain in California is assured by the *First Methodist Episcopal Church* v. *County of Los Angeles*, 204 Cal. 201, 204-205.

It must be remembered that basically Section 32 is an evidentiary provision. It acts as a means of obtaining the necessary information for the assessor to make his determination that taxpayers are not entitled to certain property tax exemptions. However, where the constitution authorizes the legislature to "enact such laws as may be necessary to enforce the provisions of this section" there is no constitutional requirement that the same method of enforcement be used as to all taxes or that the legislature provide all the laws necessary to enforce the constitutional provision at once. It could be subsequently determined that an oath should be required in claiming other tax exemptions or it could set up some other method of obtaining evidence as to whether applicants for tax exemptions advocate the overthrow of the government

by force or violence. As this Court has itself held, the legislature is at liberty to select one phase of a problem for appropriate action without the necessity of including all others which might be affected in the same field of legislation. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489.

## VII. THIS COURT'S RECENT "PRE-EMPTION" CASE OF PENNSYLVANIA VS. NELSON DID NOT THE SLIGHTEST VIOLENCE TO THE RIGHT OF CIVIL REGULATION, THE PROBLEM HERE INVOLVED.

Appellants' reliance on the case of *Pennsylvania* v. *Nelson*, 350 U.S. 497, is unjustified when the true holding of the case is examined. (Jur. St., pp. 17-18.) The direct question presented to this Court in the *Nelson* case was whether the Smith Act (18 U.S.C. Section 2385) which prohibits a knowing advocacy of the overthrowing of the government of the United States by force and violence superseded the enforcibility of the Pennsylvania Sedition Act which proscribed the same conduct. Clearly, the Court was concerned with *penal* laws and in concluding that the federal government pre-empted the sedition field as far as *penal* laws were concerned did no violence whatsoever to the right of civil regulation by the states, the problem here involved. Clearly this is true when it is recognized that a scant few weeks after the *Nelson* decision this Court in *Schlockower* v. *Board of Higher Education in the City of New York*, 350 U.S. 55, affirmed its prior decision in *Adler* v. *Board of Education*, 342 U.S. 45, and *Garner* v. *Board of Public Works*, 341 U.S. 716.

## CONCLUSION

WHEREFORE, the motion to dismiss the appeal should be granted.

Respectfully submitted,

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